17-0206

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

TERRI L. SMITH and
KENNETH W. SMITH
Plaintiffs,

vs.

CIVIL ACTION NO. 13-C-323
Judge David J. Sims

ROBERT TODD GEBHARDT,
MICHAEL COYNE and
TRIPLE S&D, INC.,
Defendants.

ORDER

The matter comes before the Court on Defendant Robert Todd Gebhardt's (hereinafter referred to as "Gebhardt") Motion to Dismiss filed November 14, 2016, and Gebhardt's Supplemental Brief in Support of Motion to Dismiss filed December 2, 2016. Plaintiffs filed a Supplemental Memo in Opposition to Gebhardt's Motion to Dismiss on December 14, 2016. An evidentiary hearing was held on Gebhardt's Motions to Dismiss on November 15, 2016. At the said hearing, both Plaintiffs and Gebhardt testified. The Court has reviewed the pleadings and the exhibits submitted by the parties. The Court has considered the testimony offered at the November 15, 2016 hearing, the argument of counsel, and the pertinent legal authority. The Court makes the following rulings.

I. CONTENTIONS OF THE PARTIES

Gebhardt seeks an Order dismissing this matter as a sanction for Plaintiffs alleged repeated litigation misconduct and spoliation of evidence. The Court has previously declined to impose sanctions against Plaintiffs in this matter. Gebhardt contends that Plaintiffs' conduct has compromised the integrity of the judicial process and has destroyed his right to a fair adjudication of this case. Plaintiffs deny Gebhardt's contentions and assert that they have engaged in no unlawful or improper conduct.

II. FACTUAL BACKGROUND

In July of 2009, Plaintiffs contracted with Gebhardt for construction of a new home located at 3528 Middle Creek Road in Triadelphia, West Virginia. Said home was constructed by Gebhardt, who retained Defendants Coyne and Triple S&D as a sub-contractor for brick installation.

On or about September 27, 2013, Plaintiffs initiated the present litigation for breach of contract and negligent construction of the home, among other claims. The essence of Plaintiffs' claim is that water has intruded into the foundation and basement of their home causing mold and other damage. Plaintiffs claim that, as a result, the home is a total loss and they are seeking damages for the construction of a new home. Defendants counter that Plaintiffs have been intentionally causing water damage to their home by watering it with a garden hose, blocking the foundation drain system, and deconstructing portions of the exterior. Plaintiffs deny Defendants' contentions.

III. LEGAL STANDARD[1]

In West Virginia, sanctions typically involve monetary fines such as ordering the sanctioned party to pay the other party's attorney's fees and costs. However, a trial judge also may sanction a party by dismissing a case, entering a default judgment, excluding specific testimony, or striking certain defenses. Sanctions usually are imposed as a punishment for violating rules of procedure or for abusing the judicial process.

In *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996), in addressing the imposition of sanctions, the Court held that:

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[1] The Court acknowledges Justice Robin Jean Davis, Judge Alan D. Moats and Louis J. Palmer, *Review of Supreme Court Cases Involving Trial Court Sanctions* as an excellent resource on the legal standards.

> It is hard to find an area of the law in which the governing rules are, and probably have to be, so vague.... The difficulty is that the range of circumstances is so vast, and the problems so much matters of degree, as to defy mechanical rules.

In reviewing sanction orders by trial courts on appeal, "the question is not whether [the Supreme Court] would have imposed a more lenient penalty had [it] been the trial court, but whether the trial court abused its discretion in imposing the sanction." *Bartles*, 196 W. Va. at 389-90, 472 S.E.2d at 835-36. A high degree of deference will be accorded a trial judge's sanction decision.

The decision in *Bartles* is the seminal West Virginia case on the imposition of sanctions. In *Bartles*, the Court set out the general core principles that are to be used for determining what type of sanction is appropriate. *Bartles* involved litigation over an automobile accident. The trial court concluded that Defendant "willfully failed to comply, stone-walled, and purposefully stalled with regard to the discovery orders ... [and] redacted and blacked out areas without justification." *Bartles*, 196 W. Va. at 388, 472 S.E.2d at 834. The trial court then imposed a $10,000 sanction against Defendant.

On appeal, the Supreme Court set forth core guidelines to be utilized by trial courts in imposing sanctions:

> Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exists a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.

Syl. pt. 1, *Bartles*, 196 W. Va. 381, 472 S.E.2d 827. Further,

> [i]n formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants

> a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the Case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Syl. pt. 2, *Bartles, id.*

After setting out the above principles, the Supreme Court concluded that the trial court did not abuse its discretion by issuing the sanction against Defendant. The Court determined that the succession of discovery violations committed by Defendant indicated a general unwillingness to comply with court orders and was enough to justify the sanction of a default judgment in addition to the monetary sanction.

It is necessary for a trial court to hold an evidentiary hearing regarding the imposition of sanctions. In *Karpacs-Brown v. Murthy*, 224 W.Va. 516, 686 S.E.2d 746 (2009), the Court stated that "there are several problems with the circuit court's order awarding attorney fees." *Karpacs-Brown*, 224 W.Va. at 526, 686 S.E.2d at 756. The main problem was the lack of an evidentiary record, and the Court remanded the matter for development of an adequate record on the issue of sanctions.

A trial court has the inherent authority to strike defenses and impose default judgment as a sanction for serious misconduct. In *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 226 W.Va. 103, 697 S.E.2d 139 (2010), the trial court found that Defendant had engaged in a pattern of extensive litigation misconduct. As a result of the misconduct, the trial court sanctioned Defendant by striking its defenses and granting default judgment to Plaintiffs. The trial court cited to Rule 37(b) of the West Virginia Rules of Civil Procedure as the source of authority for imposing the sanctions.

On appeal, the Court found that insofar as no order compelling discovery had been entered, Rule 37(b) did not provide a basis for sanctioning Defendant. However, after finding that the trial court did not have a rule-based source of authority for its sanction, the Court held that "the inherent power of courts to sanction misconduct includes the authority to enter default judgment orders in appropriate circumstances." *Richmond*, 226 W.Va. at 111, 697 S.E.2d at 147. Furthermore, the opinion stated:

> Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld on review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.

Syl. pt. 7, *Richmond American*, 226 W.Va. at 103, 697 S.E.2d at 139.

The Court then concluded that the sanction order did not set out sufficient facts for review and remanded the case to the trial court and authorized it to "proceed in imposing sanctions if, as established by the terms of the sanction order, the action taken is based on specific factual findings of serious misconduct[.]" *Richmond American*, 226 W.Va. at 114, 697 S.E.2d at 150.

In *Anderson v. Kunduru*, 215 W. Va. 484, 600 S.E.2d 196 (2004), the Court considered the issue of whether a sanction for attorney misconduct was too harsh for an innocent client. In evaluating the sanction imposed by the trial court, the Supreme Court found that the sanctionable "conduct was entirely the fault of [Plaintiff's counsel], and not his client." *Anderson*, 215 W.Va. at 489, 600 S.E.2d at 201. In reversing the sanction, the Court reasoned as follows:

> Fairness dictates that any sanction should have been directed against the [attorney] and the sanction imposed in a manner that would best dispel any cost or prejudice to the opposing parties. For instance, the circuit court could have postponed the trial date.... and imposed the costs of the delay... upon counsel for the appellant. Justice compels that the offending attorney should suffer for his actions, not the litigants.

Anderson, 215 W. Va. at 489, 600 S.E.2d at 201.

The decision in *Anderson* was followed in *Goldizen v. Grant County Nursing Home*, 225 W.Va. 371, 693 S.E.2d 346 (2010). In *Goldizen*, the trial court sanctioned Plaintiff for failing to locate a witness so that he could be deposed by Defendant. As a sanction for failing to locate and make the witness available, the trial court excluded his testimony. The trial court subsequently granted summary judgment to Defendant.

The Supreme Court relied upon *Anderson* in evaluating the sanctionable conduct in *Goldizen*. Specifically, the opinion noted that, "[i]n *Anderson*, we reversed the circuit court finding that 'the circuit court essentially imposed a sanction upon a party ... for the admittedly sole misconduct of the party's attorney.'" *Goldizen*, 225 W.Va. at 376, 693 S.E.2d at 351 (quoting *Anderson*, 215 W. Va. at 488, 600 S.E.2d at 200). The opinion in *Goldizen* made clear that "the conduct leading to the circuit court's sanction was that the Plaintiffs' trial counsel had been dilatory in locating a missing witness[.]" *Goldizen*, 225 W. Va. at 376, 693 S.E.2d at 351. The Court reversed the sanction holding:

> While we accord the circuit court considerable deference, and rightfully so, no sanctions were warranted . . . beyond that of verbally reprimanding Plaintiffs' trial counsel for being dilatory. Trial courts should be extremely guarded against imposing sanctions that tend to eviscerate a party's case on a critical issue.

Goldizen, 225 W. Va. at 376, 693 S.E.2d at 35.

Intentional spoliation of evidence is defined as "the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." (citation omitted). *Hannah v. Heeter*, 213 W. Va. 704, ___, 584 S.E.2d 560, 572 (2003).

"It is a fundamental principle of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence." *Tracy v. Cottrell*, 206 W.Va. 363, 371, 524 S.E.2d 879, 887 (1999). In *Tracy*, the Court concluded that under appropriate circumstances, an

adverse inference instruction may be given or sanctions levied where physical evidence was destroyed by a party to an action. In Syllabus Point 2 of *Tracy*, the Court held:

> Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.

IV. ANALYSIS

Gebhardt contends that Plaintiffs and Plaintiffs' counsel have engaged in repeated misconduct in this litigation and have engaged in prejudicial spoliation of evidence by: 1) secretly destroying and manipulating evidence; 2) watering their home; 3) destructing brick; 4) blocking their own away drain; 5) performing a bannister test without notice to Defendants; 6) performing mold tests without notice to Defendants; 7) filing untruthful and inaccurate expert disclosures; 8) improperly recording Gebhardt; 9) improperly communicating with and retaining Gebhardt's Rule 26(b)(4) non-testifying consultant; and 10) improperly contacting Gebhardt through a third party without notice to Gebhardt's counsel. The Court will address these contentions in turn.

1) Secretly Destroying and Manipulating Evidence

During the litigation, Plaintiffs conducted what has been referred to as the "orange paint test" without notice to Defendants. The test was performed by Plaintiffs' experts, Jake Lammott. The orange paint was supplied and applied by Mr. Lammott, with permission of Plaintiffs and

their counsel, during testing done by him using the instruments for ground penetrating radar to identify areas where the cement block in the foundation have not been grouted full with mortar or concrete and are hollow.[2] Plaintiffs assert that Gebhardt twice told them during the secretly recorded conversation that the basement walls were "poured solid concrete." Plaintiffs apparently conducted the orange paint test in an effort to impeach Mr. Gebhardt.

Plaintiffs admitted under oath that their unfinished basement is covered in orange spray paint and that their basement walls look "bad" as a result. Plaintiffs agreed that this was done to improve their case against Gebhardt and that the test was done without prior notice to Defendants, their counsel, or the Court.

2) Watering Their Home

At her deposition, Plaintiff Terri Smith[3] admitted that on April 14, 2013, she positioned a garden hose at the corners of Plaintiffs' home and continuously ran the hose for periods of time lasting from 25 minutes to one hour and 30 minutes. See also, Plaintiffs' Complaint ¶50. Plaintiffs took photos to document this. Plaintiffs repeated the watering of the foundation on at least 2 more occasions on April 15, 2013, and April 23, 2013.[4] See Plaintiffs' Complaint ¶51 and 58.

Both Plaintiffs admitted under oath at the evidentiary hearing, that with approval of Plaintiffs' counsel, that they watered their house with a garden hose and intentionally forced

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[2] Mr. Lammott testified at his deposition that he did not have to use orange paint. He could have used chalk, crayon or pencil, but they would not have shown up as well in the pictures.

[3] To say that Ms. Smith was a reluctant witness with a faulty memory on direct examination at the evidentiary hearing is being generous.

[4] At her deposition, Ms. Smith repeatedly testified that she could not recall how many occasions she had watered the foundation and for how long she ran the water.

water into the corners of their basement, which they admit is evidence in this case. Ms. Smith admitted that this action altered the appearance of the basement walls and was done to prove Plaintiffs' case against Defendants. Both Plaintiffs testified under oath that this intentional watering resulted in damage to those corners.

3) Destructing Brick

In early November, 2014, with Plaintiffs' approval, Frank Baker removed bricks from one of the corners of the house alleged to be at issue in this case. Ms. Smith acknowledged at her deposition that the removal of the bricks could make it easier for water to penetrate the foundation and basement.

Plaintiffs admitted at the evidentiary hearing that the bricks were destructed sometime in 2014 and that the corner of the home has been exposed to the elements since that time. Plaintiffs admitted that the bricks were removed during the pendency of this litigation without prior notice to Defendants, their counsel, or the Court. Plaintiffs further admitted that since 2014 water has been penetrating the basement in the area where the brick was removed. Plaintiffs also admitted under oath that the purpose of destructing the brick was to prove their water intrusion claims against Defendants. The parties to this action attended a home inspection on March 16, 2015 and apparently, for the first time, became aware that Plaintiffs had removed portions of the brick veneer.

4) Blocking Their Own Away Drain

At some point during the litigation, Plaintiffs placed a screen over the away drain for the French drain system for their home. Plaintiffs contend that the screen was placed over the drain to prevent snakes from entering the pipe. Gebhardt testified at his deposition that based upon his observation of the screen, the screen was very fine and that it was completely mildewed and

mossed in. As a result, the screen was restricting the flow of the operation of the French drain and downspout system and could cause water to back up into the foundation.

Plaintiffs admitted that they were present when Gebhardt testified that Plaintiffs' foundation away drain was blocked and that the blockage could result in water intrusion into their basement. Plaintiffs further admitted under oath at the evidentiary hearing that they removed the blockage the very next day at the direction of Plaintiffs' counsel, without prior notice to Defendants, their counsel, or the Court. Plaintiffs preserved the screen that was removed, but did not afford Defendants an opportunity to see the screen at the time it was removed.

Plaintiffs' expert, Alan Baker, testified that it was unreasonable for Plaintiffs to block their foundation drainage pipe. See Transcript of Alan Baker's Deposition, pg. 14. Further, he confirmed that blocking the foundation drainage pipe would suggest that Plaintiffs intended to get water in their basement. See Transcript of Alan Baker's Deposition, pg. 14.

5) Performing a Bannister Test without Prior Notice to Defendants

In March 2015, during the pendency of this litigation, Plaintiffs performed a "bannister test" without prior notice to Defendants, their counsel, or the Court. Plaintiffs' counsel sent an email to Defendants' counsel on March 26, 2016 enclosing photographs of "testing" to the basement handrail which occurred on or about March 20, 2016. Plaintiffs, at Plaintiffs' counsel's direction, deconstructed the connection between the handrail/bannister and the basement cement slab after which they manipulated an area beneath the floor. Plaintiffs' construction expert, Martin Maness, admitted that no guidelines or protocols were followed in performing this "test" and that he had never performed this type of test before.

Mr. Smith admitted that at Plaintiffs' counsel's direction, he disassembled the Newel post from the banister at the bottom of the steps to the basement and that he lifted it off a metal rod that had been placed in a hole through the concrete by Gebhardt to make the Newel post more secure. Mr. Smith then contacted his counsel who then contacted Plaintiffs' designated experts, Mr. Maness and John Gongola, to inspect what Mr. Smith had done. Counsel and the said experts then performed "measurements" in the hole.

Plaintiffs admitted under oath that they deconstructed their basement bannister with the intent to prove a case against Gebhardt and agreed that this was done without prior notice to Defendants, their counsel, or the Court.

6) Performing Mold Tests without Notice to Defendants

Plaintiffs designated John Gongola as their mold expert in this matter. Mr. Gongola issued reports dated January 30, 2015, and March 23, 2015. The January 30, 2015 report was generated as a result of Mr. Gongola's four hour visit to Plaintiffs' home on September 25, 2014. The March 23, 2015 report was generated as a result of Mr. Gongola's one hour visit to Plaintiffs' home on March 20, 2015. No other inspections were performed by Mr. Gongola.

Mr. Gongola testified that at the September 25, 2014 inspection, he collected air samples and performed wall cavity tests which involved drilling "aperture[s] in the drywall." These tests were performed during the pendency of this litigation without prior notice to Defendants, their counsel, or the Court. During the testing, Mr. Gongola utilized a moisture meter in determining where to test for mold, but he testified that he did not record the moisture meter readings. Plaintiffs concede that Mr. Gongola did not record the readings, but contend that Mr. Gongola did write down the readings during the March 20, 2015 inspection which are contained in his March 23, 2015 report.

Mr. Gongola collected three (3) wall samples, by drilling a hole smaller in diameter than a dime into the walls and then placing a sterile aperture into the hole collecting a 30 second air sample of 7.5 liters of volume of air. After that, the holes were sealed. Mr. Gongola did not preserve the air samples but submitted them to a lab for testing.

7) Filing Untruthful and Inaccurate Expert Disclosures

During the course of this litigation, Plaintiffs have designated ten (10) expert witnesses. The Court has addressed several issues with regard to Plaintiffs' expert disclosures by way of previous Orders.

Plaintiffs disclosed Mr. Maness as one of their construction experts. Plaintiffs disclosed no less than 22 separate opinions held by Mr. Maness. No less than 13 of those opinions were excluded by the Court. Most were excluded by way of Mr. Maness disclaiming or withdrawing the opinion during cross examination at his deposition. Others were excluded by the Court on the basis that Mr. Maness had no expertise to render the disclosed opinion.

Plaintiffs disclosed Richard Derrow as their flooring expert. Plaintiffs disclosed that Mr. Derrow would provide an opinion that the cost of the demolition of the existing hardwood floor and installation of new flooring would be $12,952.00.

However, during his deposition, Mr. Derrow testified that the estimate provided to Plaintiffs would be for a "superior product" as compared to the existing flooring that Plaintiffs' selected for their home. Mr. Derrow testified that the existing wood flooring product selected and purchased by Plaintiffs' was "a prefinished floor." Mr. Derrow testified that he could not offer an estimate for installation of a product similar to the existing floor, as he does not work with prefinished flooring. He testified that the "superior product" would be slightly better and would cost slightly more.

Mr. Derrow's estimate was for total replacement of their current floor with an unfinished, non-domestic, exotic wood flooring product, which he would then sand, stain, and seal. Mr. Derrow agreed that the estimate he provided was for a "custom floor." Mr. Derrow testified that because the existing floor is solid walnut, he could strip it, sand it, refinish it and put a new stain on it. He testified that the cost of repairing the existing floor would be roughly $6,000.00, but no less than $5,000.00.

The Court excluded Mr. Derrow from testifying at trial about the estimate for a new, different, more expense floor excluded pursuant to Syl. Pt. 2, *Jarrett v. E.L. Harper & Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977) permitting Plaintiffs to recover only the cost of repairing the floor.

Plaintiffs disclosed Fred Casale, a foundation consultant with Engineered Foundation Solutions, as an expert. Mr. Casale testified during his deposition that he provided a repair estimate to Plaintiffs on May 18, 2012, for a full interior subfloor waterproofing system in their basement. Mr. Casale testified that the system would eliminate the alleged water issues Plaintiffs' have in their basement.

Mr. Casale testified that he was unable to identify the cause of the water entry into Plaintiffs' basement. Mr. Casale also testified that he did not review the brick veneer on Plaintiffs' home to determine whether it was causing and/or contributing to the alleged water issues. Finally, Mr. Casale could not see any construction defect which was permitting water to pass into the house. Therefore, the Court excluded Mr. Casale from testifying at trial as to the cause of the water entry into Plaintiffs' basement.

Plaintiffs disclosed Josh Emery, an employee of Baker's Waterproofing Co., Inc., as an expert designated to testify with regard to a home warranty, any proposals regarding work to be done on the house, and any opinions regarding causation.

Mr. Emery gave Plaintiffs an estimate in the amount of $16,956.00 to waterproof their basement. Mr. Emery testified that this proposal guaranteed a "dry, usable space." Mr. Emery testified he subsequently met with Plaintiffs and Plaintiffs' counsel, wherein Plaintiffs and/or Plaintiffs' counsel insisted on a second proposal, which Mr. Emery provided an estimate in the amount of $44,114.00. There was no warranty on the second proposal. Mr. Emery testified that he did not recommend this second proposal for $44,114.00.

The Court excluded the second proposal provided to Plaintiffs from being introduced into evidence, in the amount of $44,114.00 under Rule 403 of the West Virginia Rules of Evidence. Further, Mr. Emery denied knowledge as to what was causing the alleged water intrusion into Plaintiffs' basement and testified at this deposition that he had no opinion as to whether the water was coming from the brick veneer on the house or whether the water was coming from above grade. Accordingly, the Court precluded Mr. Emery from offering an opinion at trial regarding the cause of the alleged water issues in Plaintiffs' home.

Plaintiffs disclosed John Gongola as an expert regarding the hazards of mold and construction issues. The Court has previously ruled that Mr. Gongola does not have the requisite knowledge, training, or experience to opine in areas of medicine, the effects of mold on general health, and/or the effects of alleged mold in Plaintiffs' home to any adverse health effects alleged by Plaintiffs and, accordingly, ruled that he may not render any opinions at trial regarding the adverse health effects of mold, either in general or in relation to Plaintiffs.

Mr. Gongola is a certified indoor environmentalist, not a contractor. He has no construction experience. As a result, the Court ruled that Mr. Gongola does not have the requisite knowledge, training, or education to testify and/or proffer opinions regarding construction issues in this matter and precluded him from offering opinions regarding construction matters at the trial of this matter.

Finally, the Court ruled that Mr. Gongola is not a certified contracting remediator and that therefore, Mr. Gongola's un-itemized "guesstimate" of Plaintiffs' mold remediation costs was not sufficiently reliable and is outside his realm of training, knowledge, and experience. The Court precluded Mr. Gongola from offering opinions and estimates at trial related to the costs of mold remediation in Plaintiffs' home.

Plaintiffs disclosed Alan Baker as one of their construction experts. As with Mr. Maness, Plaintiffs disclosed no less than 23 separate opinions held by Mr. Baker. Of those 23 disclosed opinions, Mr. Baker disclaimed no less than 16 of those opinions at his deposition. Of the 7 remaining disclosed opinions, the Court excluded 5 of them.

8) Improperly Recording Defendant Gebhardt

On April 9, 2013, prior to the filing of this civil action, Ms. Smith and Plaintiffs' counsel met with Gebhardt at Plaintiffs' home to discuss the problems Plaintiffs allege they were having with the home. During that meeting, Plaintiffs' counsel, with the knowledge and consent of Ms. Smith, secretly tape recorded the conversation without the knowledge of Gebhardt. The intent of Plaintiffs and Plaintiffs' counsel was to use the conversation against Gebhardt in this litigation.

Plaintiffs' counsel admits that he "intercepted" the conversation pursuant to W.Va. Code §62-1D-3(e). Both Plaintiffs and Plaintiffs' counsel admit that they did not disclose to Gebhardt

that they were recording him. Mr. Gebhardt testified that he "felt totally violated by that when I found that out."

9) Improperly Communicating With and Retaining Defendant Gebhardt's Rule 26(B)(4) Non-Testifying Consultant

During the pendency of this litigation, Gebhardt retained Phil Huffner of Huffner Contracting as a consulting expert. On July 3, 2015, Plaintiffs filed their Third Expert Witness Disclosure, identifying Phil Huffner as a testifying expert witness. In said disclosure, Plaintiffs acknowledged that Mr. Huffner "had been consulting with defense counsel for Mr. Gebhardt." Plaintiffs further represented "that the consultation between Mr. Huffner and Mr. Gebhardt's defense counsel was not confidential."[5]

Gebhardt asserts that the communications between Huffner and Defendant Gebhardt's counsel are confidential and that Mr. Huffner was compensated for his time and contributions to Defendant Gebhardt's defense. Gebhardt contends that counsel for Plaintiffs had secretly contacted Huffner.

Plaintiff denies that there was a secret communication with Mr. Huffner. Plaintiffs' counsel contends that on August 24, 2015, during a break in Gebhardt's expert Eric Drozdowski's deposition, counsel for Plaintiffs and counsel for Gebhardt had a discussion about Plaintiffs utilizing Mr. Huffner as an expert witness, to which Gebhardt's counsel strenuously objected. Plaintiff counsel claims that on August 25, 2015, he had a telephone conference with Gephardt's counsel and advised him that he would not be using Mr. Huffner as an expert, but potentially as a fact witness.

[5] At the evidentiary hearing, Plaintiffs' counsel denied that there was ever an expert disclosure filed by Plaintiffs designating Mr. Huffner as an expert witness. When confronted with the document, Plaintiffs' counsel admitted he was mistaken and claimed that it was later withdrawn. The Court could not locate a pleading in the court file formally withdrawing the expert disclosure.

The Court has previously ruled that Plaintiffs may not call Mr. Huffner as a witness in this matter pursuant to Rule 26(b)(4)(B) of the West Virginia Rules of Civil Procedure, *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984) and *State ex rel. Chaparro v. Wilkes*, 438 S.E.2d 575, 190 W.Va. 395 (1993).

10) Improperly Contacting Defendant Gebhardt Through A Third Party Without Notice To Defendant Gebhardt's Counsel

The trial in this matter was scheduled for November 14, 2016. Nevertheless, on November 7, 2016, Plaintiffs engaged a third-party private process server to serve a subpoena duces tecum upon Gebhardt, without prior notice to his counsel,[6] which improperly directed him to appear in the Circuit Court of Marshall County, West Virginia, on the first day of trial in this matter, and commanded him to produce gravel receipts for the gravel used in the construction of Plaintiffs' home. After service of the subpoena, the third party server engaged Gebhardt in conversation for 8-10 minutes, some of which was a discussion of the present lawsuit and the documents being sought.

Gebhardt testified during the evidentiary hearing that he believed that this was a proper and legitimate legal document. He testified that he was concerned that he would be unable to locate and produce the documents and that he "was pretty worked up about it." He then made significant efforts to locate the documents sought, without contacting his counsel. He had

[6] The language of W. Va. R. Civ. P. 45(b)(1) (""[p]rior notice of any commanded production of documents and things . . . shall be served on each party in the manner prescribed by Rule 5(b)") has been interpreted by the West Virginia Supreme Court of Appeals to require notice to parties prior to service of a subpoena duces tecum. See *Keplinger v. Virginia Electric and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000).

conversations with the third-party,[7] employee(s) of Contractor Supply, employee(s) of Belmont Aggregate, and Craig Templin[8] regarding the gravel receipts demanded by Plaintiffs.

In relation to the subpoena, Plaintiffs' counsel proffered during the evidentiary hearing that because Gebhardt's counsel was unlikely to cooperate in providing the requested gravel receipts, the subpoena was served directly upon Gebhardt without prior notice to his counsel.

Counsel for the parties appeared before the Court on November 7, the same day the subpoena was signed. At no time during the hearing did Plaintiff's counsel mention anything about the documents sought by the subpoena or request that the documents be produced.

V. RULING

Courts should only use dismissal when other measures are unlikely to achieve the desired result. The Court has several alternative sanctions available to it short of dismissal. The Court may assess monetary sanctions, award attorney fees and costs, strike witnesses, testimony, or evidence, or strike claims or defenses, among other remedies. The Court must consider whether sanctions other than dismissal would effectively punish and deter Plaintiffs' misconduct.

In considering if sanctions are warranted in this matter, the Court must consider the misconduct itself: permitting the basement walls to be spray painted orange during the pendency of the litigation without notice to Defendants; intentionally watering the foundation of the house thereby causing water intrusion to the basement; removing a portion of the brick exterior thereby exposing the foundation to the elements and permitting water to penetrate the foundation; blocking the away drain with a screen thereby causing water to back up into the foundation and

[7] The third-party hired by Plaintiffs invoked his Fifth Amendment right to not testify at the evidentiary hearing.

[8] Plaintiffs have identified Mr. Templin as a fact witness expected to be called at the trial of this matter.

then subsequently removing the screen blocking the away drain without notice to Defendants; performing the bannister testing and mold testing during the pendency of the litigation without notice to Defendants; filing expert disclosures riddled with falsehoods and disclaimed opinions; secretly recording Gebhardt without his knowledge; retaining Gebhardt's consulting expert witness; and serving a defective subpoena directly on Gebhardt one week prior to trial without prior notice to Gebhardt's counsel.

Each of these actions in and of themselves would not necessarily give rise to the imposition of sanctions. In fact, to date, the Court has declined to impose sanctions for some of the individual conduct listed above. However, taken as a whole, Plaintiffs' actions demonstrate a pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice, and deprives Defendants of their right to a fair trial in this matter.

At the heart of this case is Plaintiffs' claim that Gebhardt negligently constructed their home thereby causing water intrusion into their foundation and basement. Given this claim, Plaintiffs actions in: 1) permitting the basement walls to be spray painted orange; 2) intentionally watering the foundation; 3) removing a portion of the brick exterior; and 4) blocking the away drain, are inexplicable and egregious. Each of these actions irretrievably taints evidence and contaminates Plaintiffs' claim that Gebhardt's negligence proximately caused the water intrusion and the resulting damages. Their conduct in each of these four (4) areas appears to be a conscious effort by Plaintiffs to unfairly influence the outcome of the litigation in their favor on the issues of both liability and damages. Plaintiffs' actions involve more than mere negligence. Plaintiffs have acted willfully, intentionally, and in bad faith.

Plaintiffs are personally culpable for this conduct as they have permitted the basement walls to be painted orange and have actively engaged in watering the foundation, deconstructing the bricks, and blocking the away drain. The spoliation of evidence set forth above is not solely the misconduct of their counsel. Plaintiffs bare substantial responsibility for the destruction, alteration, and spoliation of evidence.

It is clear that Plaintiffs had full control, ownership, possession or authority over the destroyed or significantly altered evidence and that Plaintiffs engaged in each of the listed actions without prior notice to Defendants. Defendants are significantly prejudiced by the destruction or alteration of the evidence without prior notice by Plaintiffs. Plaintiffs should have reasonably anticipated that the evidence would be needed for the litigation as the water intrusion issues are at the heart of this case. It would be exceedingly difficult if not impossible for a trier of fact to determine which instances of water intrusion and resulting water stains were caused by Gebhardt's negligence, if any, and which were caused by Plaintiffs' self-inflicted actions.

The basement in question is not now reflective of the workmanship of Gebhardt. Plaintiffs have obliterated any delineation between the initial construction by Gebhardt and the subsequent spoliation, manipulation, and alteration caused by Plaintiffs. A jury cannot now independently review and evaluate Plaintiffs' claims and alleged damages against Defendants.

Plaintiffs' conduct in performing the bannister testing and mold testing without prior notice to Defendants was wholly improper and contrary to the fair administration of justice. Plaintiffs and their counsel know that the water intrusion issues are at the heart of this case and that performing tests during the pendency of this action could prejudice Defendants ability to fairly defend Plaintiffs' claim. Considering the totality of the circumstances in this matter, the

Court concludes that Plaintiffs' conduct in this regard was designed to provide them with an unfair advantage at the trial of this matter.

As is more fully described in Section IV, 7 above, Plaintiffs filed several untruthful and inaccurate expert disclosures. The filing of these disclosures sent Defendants on a costly and time consuming wild goose chase in discovery.

Plaintiffs disclosed Mr. Maness as one of their main construction experts. Plaintiffs disclosed no less than 22 separate opinions held by Mr. Maness. However, at his deposition, Mr. Maness disclaimed or withdrew a significant number of those opinions. No less than 13 of the opinions were ultimately excluded by the Court after review Mr. Maness' deposition transcript.

Plaintiffs attempted to claim damages they could not lawfully recover through their flooring expert, Richard Derrow. After reviewing Mr. Derrow's deposition transcript, the Court was forced to exclude Mr. Derrow's testimony regarding his estimate for installing a new, different, more expense floor and limited his testimony to the cost of repairing the floor.

Plaintiffs' foundation expert, Fred Casale, testified during his deposition that: 1) he was unable to identify the cause of the water entry into Plaintiffs' basement; 2) he did not review the brick veneer on Plaintiffs' home to determine whether it was causing and/or contributing to the alleged water issues; and 3) that he could not see any construction defect which was permitting water to pass into the house. Therefore, after reviewing Mr. Casale's deposition transcript, the Court excluded Mr. Casale from offering expert opinions at trial as to the cause of the water intrusion into Plaintiffs' basement.

Plaintiffs' waterproofing expert, Josh Emery, was designated to testify with regard to a home warranty, proposals regarding work to be done on the house, and opinions regarding causation. Mr. Emery gave Plaintiffs an estimate in the amount of $16,956.00 to waterproof

their basement which had a guarantee of a "dry, usable space." Plaintiffs and Plaintiffs' counsel subsequently requested a second proposal, in which Mr. Emery provided an estimate in the amount of $44,114.00, with no warranty. Mr. Emery testified at his deposition that he did not recommend the second more expensive proposal. The Court excluded the second proposal requested by Plaintiffs from evidence as being irrelevant.

Mr. Emery also denied knowledge as to what was causing the water intrusion into Plaintiffs' basement and testified at this deposition that he had no opinion as to whether the water was coming from the brick veneer on the house or whether the water was coming from above grade. Accordingly, after reviewing Mr. Emery's deposition transcript, the Court precluded Mr. Emery from offering an opinion at trial regarding the cause of the water intrusion into Plaintiffs' home.

Plaintiffs disclosed John Gongola as an expert regarding the hazards of mold and construction issues. After reviewing his deposition transcript, the Court ruled that Mr. Gongola does not have the requisite knowledge, training, or experience to opine in areas of medicine, the effects of mold on general health, and/or the effects of alleged mold in Plaintiffs' home to any adverse health effects alleged by Plaintiffs and precluded him from rendering any opinions at trial regarding the adverse health effects of mold.

Further, the Court found that Mr. Gongola had no construction experience and, as a result, precluded him from offering opinions regarding construction matters at the trial of this matter. Finally, the Court found that Mr. Gongola is not a certified contracting remediator and that therefore, he may not offer opinions and estimates regarding the costs of mold remediation in Plaintiffs' home.

Finally, Plaintiffs disclosed Alan Baker as one of their construction experts. As with Mr. Maness, Plaintiffs disclosed no less than 23 separate opinions held by Mr. Baker. At his deposition, Mr. Baker disclaimed no less than 16 of those 23 opinions. Of the 7 remaining disclosed opinions, the Court excluded 5 of them.

Perhaps the most concerning issue raised by Gebhardt is the Plaintiffs' secret recording of him during a meeting on April 9, 2013. Ms. Smith and Plaintiffs' counsel met with Gebhardt on that date at Plaintiffs' home to discuss the problems Plaintiffs allege they were having with the construction of the home. During that meeting, Plaintiffs' counsel, with the knowledge and consent of Ms. Smith, secretly tape recorded the conversation without the knowledge of Gebhardt. It is clear that Plaintiffs recorded Gebhardt in an effort to gather evidence in their favor and against Gebhardt. Plaintiffs correctly contend that the surreptitious recording was lawful. Mr. Gebhardt testified at the evidentiary hearing that he "felt totally violated by that."

Several jurisdictions have ruled that an attorney may not ethically record a conversation or any portion of a conversation of any person whether by tape or other electronic device, without the prior knowledge and consent of all parties to the conversation. See *Anonymous Member of South Carolina Bar, Matter of*, 404 S.E.2d 513, 304 S.C. 342 (1991). Other jurisdictions have ruled that an attorney may ethically record a conversation or any portion of a conversation of any person under certain circumstances. American jurisdictions appear to be split on this issue. The Court could find no decision in West Virginia directly on this issue.

The Court is totally uncomfortable with the secret recording of Gebhardt. Just because something is legal, doesn't make it right. The Court finds that the surreptitious recording of Gebhardt by Plaintiffs and Plaintiffs' counsel, while not illegal and not clearly unethical, was dishonorable and undermined the integrity of the judicial system. It was underhanded and

prejudicial to the fair administration of justice. The Court finds that Plaintiffs' conduct was deceitful, and that Plaintiffs and Plaintiffs' counsel misrepresented themselves to Gebhardt. The Court has previously excluded the recording from evidence at the trial of this matter.

The Court is equally uncomfortable with Plaintiffs' conduct in communicating with and retaining Mr. Huffner, Gebhardt's Rule 26(b)(4) non-testifying consultant.[9] Mr. Huffner almost certainly possessed confidential information materially related to this matter from his consultation with Gebhardt's counsel. It is unclear to the Court whether Mr. Huffner used or disclosed the confidential information in communications with Plaintiffs' counsel. If he did use or disclose the information to Plaintiffs' counsel, it would unquestionably taint the proceedings and threaten the fairness of this litigation.

Plaintiffs' counsel admits that he first spoke with Mr. Huffner on August 26, 2014, at which time Mr. Huffner advised Plaintiffs' counsel, that he was aware of this litigation and that he had spoken to an attorney, whose name he could not recall, about the case. Plaintiffs' counsel denied having any discussion with Mr. Huffner concerning any confidential or privileged information that was disclosed by any lawyer to Mr. Huffner. Plaintiffs' counsel claims that the discussion related only to Mr. Huffner's observations from looking at pictures that had been shown to him by the lawyer or lawyers and Mr. Huffner's opinions.

It is objectively reasonable to conclude that Plaintiffs' counsel was aware that a confidential relationship existed with Mr. Huffner and another party to this action. It is difficult to fathom that Mr. Huffner conveyed absolutely no information that was confidential or privileged to Plaintiffs' counsel.

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[9] The Court is familiar with Mr. Huffner, Mr. Alan Baker, Mr. Maness and Mr. Gebhardt by reputation in the local community. Each has a solid reputation. The Court would consider them to be relative equals in the home construction business, in addition to being competitors.

Given that Plaintiffs had already disclosed at least two (2) other experts on construction issues, the Court can only conclude that Plaintiffs retained Mr. Huffner in an effort to obtain an unreasonable advantage over Gebhardt in this litigation. The retention of Mr. Huffner by Plaintiffs is fundamentally and patently unfair to Gebhardt. The Court has already struck Mr. Huffner as a witness in this matter, but is at a loss to fashion a further remedy for the untold damage done to Gebhardt's defense strategy.

On more than one occasion in this litigation, the Court has found that Plaintiffs' failure to provide prior notice to Defendants of their testing or manipulation of evidence was improper. While the Court has excluded some of the evidence, to date, the Court has declined to impose sanctions for Plaintiffs' conduct. Given this fact, Plaintiffs' decision to directly serve a defective subpoena on Gebhardt without prior notice to his counsel one week prior to trial is particularly egregious conduct. Especially in light of the fact that the parties were before the Court a few days before the subpoena was issued, and Plaintiffs' counsel failed to advise the Court that there were any outstanding discovery issues. Plaintiffs repeated disregard for the notice requirements in this litigation, despite this Court's admonishments, demonstrates Plaintiffs' reckless disregard for proper judicial process. Plaintiffs were simply not deterred by the Court's prior Orders. Plaintiffs should have been cognizant of the possible ramifications of continuing to disregard notice to Defendants.

Plaintiffs' circumvention and disregard of proper and accepted legal practices and procedures, both in relation to service of the subpoena and throughout this litigation, to further their claims and harm Gebhardt's defense, is disturbing. The fact that Plaintiffs do not dispute serving defective legal process upon Gephardt, process which commanded production of documents more than a year after the conclusion of discovery, and commanded Gebhardt's

personal attendance at an improper time and place, without any notice to the Court[10] or counsel, is outrageous.

Nevertheless, Plaintiffs boldly claim that because Gebhardt admitted that he was not physically intimidated by the process server, there is no harm and no foul. However, *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004) (per curium), establishes that the impacted party actually feeling intimidated through improper contact is an unnecessary prerequisite to award civil sanctions for litigation misconduct. As a sanction for litigation misconduct, in *Kocher*, the trial court struck Defendant's defenses and granted judgment on liability to Plaintiff. Significantly, this relief was not overturned on appeal by the West Virginia Supreme Court of Appeals.

Plaintiffs' conduct in serving the 11th hour defective subpoena on Gebhardt without prior notice to his counsel was an improper litigation process. It circumvented his right to counsel. Plaintiffs' counsel's decision not to first contact Gebhardt's counsel about the documents being sought was reckless. Plaintiffs' counsel's intentional conduct resulted in harassment and distraction to Gebhardt on the eve of trial. Plaintiffs caused Gebhardt to waste time and effort chasing 7-year-old gravel receipts. Further, he may have been induced to make statements and admissions to a person who could be called to testify at trial against him. The Court finds that Plaintiffs' conduct in this regard constitutes severe litigation misconduct and is subject to significant sanctions.

Plaintiffs' and Plaintiffs' counsel's conduct in this case have been willful and intentional. Paragraph 5 of the Preamble to the West Virginia Rules of Professional Conduct requires, in

[10] The Court noted at the evidentiary hearing that there was not a single mention of service of a subpoena or any discovery deficiencies by Plaintiffs during the Pretrial Conference on November 4, 2016, though the subpoena was executed by Plaintiffs 3 days later.

part, that "[A] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."

The Court finds that Plaintiffs are culpable in a significant part of the misconduct that has occurred in this matter. The Plaintiffs have acted knowingly, willfully and intentionally. Plaintiffs have actively engaged in manipulation and spoliation of evidence in this matter. Given the totality of the circumstances in this matter, in order to protect the integrity of the judicial process, dismissal is the most appropriate sanction for Plaintiffs' misconduct in this matter. IT IS SO **ORDERED**. It is further

ORDERED that the Circuit Clerk of Ohio County shall provide an attested copy of this Order to counsel for the parties and their counsel.

To which rulings the respective objections of the parties hereto are hereby noted.

ENTER this 3rd day of February, 2017.

Judge David J. Sims

A copy, Teste:

Brenda L. Miller

Circuit Clerk

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